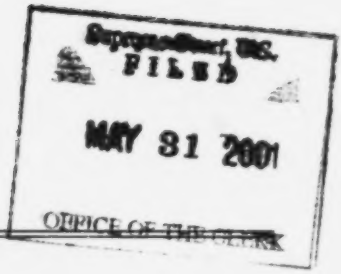

No. 00-1582

IN THE
SUPREME COURT OF THE UNITED STATES

ARCADIS GERAGHTY AND MILLER, INC.,

Petitioner,

v.

CONOCO INC.; CONDEA VISTA COMPANY,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court review a decision by the Fifth Circuit that the relevant CERCLA response activities were "removal" rather than "remedial" actions and thus the CERCLA claim was timely filed within the three-year limitations period of § 113(g)(2)(A) of that statute?

2. Should this Court review a decision by the Fifth Circuit that applied CERCLA's "operator" liability provision to the facts of the case, that held that the determinative facts are in dispute, and that left the ultimate determination of these facts to the trial court?

3. Should this Court review a decision by the Fifth Circuit that applied the "totality of the circumstances" test to the issue of CERCLA "arranger" liability, that found that the determinative facts are in dispute, and that left the determination of facts under this test, including the intent of the parties, to the trial court?

PARTIES TO THE PROCEEDING

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Conoco Inc. has no parent, nor does any publicly held company own 10% or more of the stock of Conoco Inc.

CONDEA Vista Company is wholly owned by Sasol Olefins & Surfactants GmbH, which is owned by Sasol Chemie GmbH & Co. KG, which is owned by a partnership of Sasol Chemical Verwaltungs GmbH and Sasol Chemical Holdings GmbH & Co. KG, which are owned by Sasol Chemical Holdings International (Pty) Limited, which is owned by Sasol International Holdings (Pty) Limited, which is owned by Sasol Limited. The only company which is publicly traded is Sasol Limited, which is traded on the NASDAQ (SASOY).

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Conoco Inc. and CONDEA Vista Company, respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit submitted by Petitioner, ARCADIS Geraghty & Miller, Inc.

STATEMENT

This case involves an independent contractor that exacerbated the environmental conditions it was hired to alleviate and now seeks to avoid CERCLA liability. Geraghty & Miller[1] ("G&M") was hired to investigate possible groundwater contamination at the Lake Charles Chemical Complex ("LCCC"), which has been owned and operated by either Conoco Inc. ("Conoco") or CONDEA Vista Co. ("Vista") from 1961 to the present.[2] In 1985, to comply with the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and related federal and state statutes, Conoco contracted with G&M to explore possible EDC contamination and apply its unique groundwater/environmental experience to design, construct, and sample some 50 groundwater monitoring wells. Vista is an express beneficiary of the written agreement between Conoco and G&M.[3]

Conoco and Vista contend that G&M's improper design and installation of these wells aggravated contamination at the LCCC by causing the vertical and horizontal migration of contaminants. As Petitioner correctly states in its description of the procedural history of the case, Conoco and Vista originally sued G&M in Texas state court based upon state law contract and tort

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1 Geraghty and Miller, Inc., is now ARCADIS Geraghty and Miller, Inc.

2 Conoco and Vista are also referred to collectively as "Respondents."

3 Vista purchased the LCCC from Conoco in 1984.

claims. G&M later brought a federal lawsuit against Conoco and Vista for recovery of investigation costs under CERCLA, and subsequently dropped its claims. Respondents followed with a CERCLA counterclaim against G&M, which is the subject of G&M's Petition for a Writ of Certiorari. G&M has argued at the district court level, the Fifth Circuit level, and now before this Court that the Counterclaim is barred by the applicable statute of limitations. It further claims that it is not liable under CERCLA because it is not an "operator" or an "arranger" under CERCLA.

The Fifth Circuit reversed two partial summary judgments based on these grounds that the District Court granted for G&M. The Fifth Circuit held that the Counterclaim was not barred by the applicable statute of limitations because it classified the response action in this case as "removal" rather than "remedial," and therefore applied the statute of limitations found at CERCLA Section 113(g)(2)(A). Pet.'s App., 12a, 17a.[4] Further, the Fifth Circuit found that G&M failed to establish as a matter of law that it lacked "operator" or "arranger" status, leaving the determination of these issues to the fact finder after applying the appropriate and well-established legal standards. Pet.'s App., 21a-22a. This case involves the application of CERCLA to a case where a contractor causes a new and distinct "release" of contaminants at a site already impacted by contamination, and where response actions are being conducted both before and after the new "release." The Fifth Circuit merely applied well established rules of law to this unusual set of facts; it did not improperly interpret the statute and its holding does not conflict with other case law.

Concerning the statute of limitations issue, Petitioner and Respondents agree with the Fifth Circuit that the applicable

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[4] Respondents incorporate by reference Petitioner's Appendix provided with its Writ Petition and will refer to it as Pet.'s App., followed by the applicable page designations.

statute is CERCLA Section 113(g)(2). *See* Writ Petition, p. 6. Section 113(g) provides for limitations based on two possible types of triggering responsive actions — "removal" actions or "remedial" actions — and then applies different limitations periods accordingly. A three-year limitations period runs from the completion of a "removal" action, and a six-year limitations period (beginning with physical on-site construction) is triggered by a "remedial" action. *See* 42 U.S.C. §§ 113(g)(2)(A) & (B). There is also no dispute with the definitions of "removal" and "remedial" actions applied by the Fifth Circuit. "Removal" actions generally are immediate or interim responses, and "remedial" actions generally are permanent responses. *See, e.g., OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997), *cited at* Pet.'s App., 15a. As G&M readily acknowledges, site investigation activities, including investigation and testing of groundwater, have been uniformly classified as "removal" actions. Writ Petition, p. 8, *citing Green v. Product Mfg. Corp.*, 842 F. Supp. 1321, 1325 n.6 (D. Kan. 1993) (stating that courts agree that investigation and testing of groundwater constitute "removal" actions).

G&M's disagreement with the Fifth Circuit's statute of limitation analysis is not that the wrong legal standard was applied. Instead it argues that certain response actions at the LCCC were improperly characterized as "removal" actions rather than "remedial" actions and that therefore the Court of Appeals applied the wrong statute of limitations.[5] G&M therefore argues that the Fifth Circuit failed to consider all relevant response actions at the LCCC, including response actions taken after G&M was replaced as a contractor at the LCCC, in making its determination. G&M's contention is erroneous. In reality, Peti-

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[5] As determined by the Fifth Circuit, the relevant activities are "removal" actions, and thus the three-year limitations period does not begin to run until "after completion of the removal action." 42 U.S.C. § 9613(g)(2)(A).

tioner seeks relief from how the Court of Appeals applied the law of CERCLA to the unusual case facts. Contrary to G&M's issue articulation, this case does not involve an erroneous interpretation of CERCLA's limitation provisions.

Concerning the issue whether G&M is not an operator or arranger, G&M's contention that it should be exempt from "operator" liability under CERCLA is wrong. CERCLA was designed to protect Conoco and Vista from G&M's actions. In analyzing CERCLA's "operator" liability, the Fifth Circuit looked at the "totality of the circumstances" relevant to determine whether there was "some nexus between [G&M's] control and the hazardous waste contained in the facility." Pet.'s App., 20a-21a. As explained by the Fifth Circuit, these facts would include the level of G&M's control over the groundwater wells under contract. *Id.* These critical facts were in dispute, thus making partial summary judgment in favor of G&M improper. Moreover, there is no blanket exclusion from CERCLA liability for environmental contractors. CERCLA does not require a party to own or fully operate a site such as the LCCC to be a CERCLA operator. Likewise, the Fifth Circuit found that the court must also observe the totality of circumstances in finding whether there is some nexus to be labeled a CERCLA "arranger," and that such a nexus involves "the obligation to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal." Pet.'s App, 21a-22a. Thus, the Fifth Circuit followed prevailing law on the issues of CERCLA "operator" and "arranger" liability.

While the Fifth Circuit based its decision in this case on the controlling case law and the clear language of CERCLA, G&M argues for abandoning that language and precedent and for creating an exemption for certain environmental contractors that is not included in the statute. Since Congress did not envision a blanket exclusion for environmental contractors from CERCLA liability, none should be created by the courts. The Fifth Circuit

correctly reversed the partial summary judgments that were granted in favor of G&M, and its decisions should be upheld.

REASONS FOR DENYING THE PETITION

This case has only minor ramifications for CERCLA jurisprudence and the persons affected by the statute. The Fifth Circuit correctly reversed an improvidently granted summary judgment and remanded this case for trial. The Fifth Circuit's decision is consistent with both the statutory language and case law from other circuits on the rather obscure issues involved here. Those issues are which CERCLA limitations period applies to a contractor that exacerbates a contamination problem it was hired to study and whether CERCLA's purposefully broad definitions should be construed by the courts to protect environmental contractors. Tellingly, neither of the only two court of appeals decisions with which the instant case supposedly conflicts (*Navistar* and *Kelly*) involved environmental contractors, and *Navistar* does not even confront the issue of which CERCLA limitations period applied. G&M's attempt to characterize this case as one involving issues of major importance to persons other than the parties is simply unfounded, and the petition should be denied.

I. The Fifth Circuit Properly Applied CERCLA's Statute of Limitations to the Relevant Response Activities, Including Those Conducted After G&M's Installation of Monitor Wells at the LCCC.

G&M's criticism of the Fifth Circuit's statute of limitations analysis contains two major flaws. First, in a CERCLA action against an environmental contractor that has exacerbated existing chemical plant contamination problems, the **contractor's** actions must necessarily be the focus of a limitations analysis under CERCLA §113(g)(2). Otherwise, unrelated activities at the plant could time bar the claims against the contractor even before the contractor began work. Second, the Fifth Circuit did

not exclude all consideration of post G&M activities as asserted by the Petitioner. Rather, the Court of Appeals evaluated the entirety of the relevant response activities at the LCCC and properly placed G&M's actions as part of the "removal" phase. Even if remedial steps were being taken to address groundwater contamination at another part of the plant by other contractors, those actions should not time bar Conoco's CERCLA claim against G&M for its removal related actions elsewhere.

In its review of the district court's decision that Conoco's and Vista's CERCLA claims are barred by CERCLA's statute of limitations, the Court analyzed whether **"Conoco/Vista's response actions** at the Complex are properly categorized as 'remedial' or 'removal.'" Pet.'s App., 12a (emphasis added). The Court continued its analysis of the complete groundwater quality assessment program activities that Conoco and Vista had conducted, and recognized that this program was coordinated into three phases, including: (1) "one of assessment only," (2) "a more detailed assessment," and finally (3) "establishing a groundwater monitoring and remediation program and conducting a feasibility study of remedial alternatives." *Id.* at 15a. Specifically, these activities included those that were "part of a pilot corrective action program that Conoco/Vista instituted in response to the Louisiana Department order" [i.e., activities including the tank farm program] and activities that were conducted at the site up until the time of suit — thus indicating that no "ultimate remedial strategy" had been defined for the site. *Id.* at 16a-17a. Of these various activities, G&M was involved only in the earlier assessment phases; later, more detailed assessment work including rate and extent investigation and remedial design and testing were completed by other environmental contractors. *See* Pet.'s App., 35a, 38a. The appellate record detailed all of the Conoco/Vista environmental activities at the LCCC.

Therefore, the Fifth Circuit reviewed not just activities conducted by G&M, but all of the response activities that were

part of the record, and concluded that the activities were properly characterized as "removal." The fundamental point is that G&M's work was part of the removal action when placed in the context of the case facts. Although the Court did closely review G&M's activities for its analysis, it did so to characterize properly those activities under CERCLA's limitations scheme. The Court's focus on those actions that are most relevant to whether Conoco's and Vista's CERCLA claims against G&M were timely brought is logical since it was G&M's activities that gave rise to the Conoco/Vista CERCLA claims.[6]

Not only does G&M misinterpret the Fifth Circuit's decision, it incorrectly asserts that the Fifth Circuit's decision conflicts other Circuit Courts of Appeals. Neither case cited by G&M as conflicting involved an on site contractor and one did not even address the issue of remedial vs. removal action.

The facts and issues in the Seventh Circuit's decision in *United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702 (7th Cir. 1998), and the application of CERCLA in that case are distinct from those before the Fifth Circuit here. *Navistar* involved a government action against off-site generators and haulers (traditional CERCLA "arrangers" or "transporters") to recover costs some years after a cleanup was completed under an agreement between the site owner/operator and the EPA. *See Navistar,* 152 F.3d at 704. The issue in *Navistar* was whether certain activities by the site owner, acting under a judicially-approved consent decree obtained by the EPA, constituted "initiation of physical on-site construction" of the final remedy under CERCLA's six-year limitations provision for "remedial" actions found at § 113(g)(2)(B). *Id.* at 711. The three-year "removal" limita-

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[6] Under G&M's theory, if an owner performs some removal work elsewhere on a site in response to a different release or remedial work begins elsewhere at the plant, any claim against a contractor like G&M would be time barred, possibly *before* the offending activities occurred.

tions period of § 113(g)(2)(A) was not even discussed. *Id.* at 708 ("There is no dispute here that a 'remedial action' is involved."). The instant case involves the alleged liability of an environmental contractor stemming from its activities during an on-going environmental assessment at the site. In *Navistar,* the activities of waste hauler Navistar were irrelevant to the CERCLA statute of limitations trigger events analyzed in that case. However, in this action, G&M's activities at the site as an environmental contractor are critical to the issue of CERCLA's statute of limitations because they allegedly contributed to a release at the site while performing some "response" type function. Thus, *Navistar* pertains to which construction activity triggered the six-year "remedial" limitations period, while the instant case involves whether the activities were "removal" vs. "remedial."

The Sixth Circuit's decision and the facts in *Kelly v. E. I. DuPont De Nemours and Co.*, 17 F.3d 836 (6th Cir. 1994), are also readily distinguishable from the present case. Like *Navistar,* the *Kelly* case involved a government action to recover from an off-site arranger and the site owner/operator response costs incurred in the 1980s to remedy contamination that occurred in the 1950s and 1960s. *Id.* at 838-839. The primary issue in *Kelly* was whether various removal actions should be considered separately under CERCLA's statute of limitations analysis. *Id.* at 840. Again, this was a classic case of historical contamination at a landfill caused by an off-site generator sending wastes for disposal and a response action conducted many years later. Thus the relevant activities for limitations purposes would not have been those conducted in the 1950s and 1960s during the time frame of disposal activities, but rather the response actions taken later in the 1980s. The court in *Kelly* evaluated those response actions and found them to be part of one removal action. Neither the *Navistar* nor the *Kelly* decisions conflict with the decision by the Fifth Circuit in this case.

Under G&M's theory of CERCLA's statute of limitations, a contractor like G&M might escape CERCLA liability. Suppose a facility owner began remediation at a facility and six years later hires a contractor who installs at the facility defective wells that cause a distinct release of contaminants. Under G&M's interpretation of CERCLA's limitations provision, a CERCLA claim for the later release would be automatically barred under CERCLA's statute of limitations based on the initiation of the prior, distinct remedial action. CERCLA's statute of limitations for a particular "release" simply cannot begin to run until the time that "release" occurs and a remedial action is conducted to address that "release." Thus, the Fifth Circuit was correct in focusing on those activities conducted during and after G&M's involvement at the LCCC in applying CERCLA's statute of limitations to the releases caused by G&M at the LCCC.

II. CERCLA Contains No Special Exclusion from "Operator" Liability for Environmental Contractors.

Faced with the imposition of CERCLA "operator" liability, G&M attempts to carve out an exemption for environmental contractors which simply does not exist.[7] The cornerstone of G&M's misapplication of CERCLA's operator liability provision lies in its attempt to improperly limit CERCLA's definition of "facility." A "facility" under CERCLA includes:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), **well,** pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or

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[7] Congress specifically excluded from CERCLA liability a certain class of "response action contractors." 42 U.S.C. § 9619. However, G&M does not meet the requirements of this section, and G&M does not now argue that it was acting as a "response action contractor" at the LCCC.

> (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located ....

42 U.S.C. § 9601(9) (emphasis added). G&M attempts to limit the applicable "facility" in this case to the entire LCCC; i.e., one would have to be the operator of the entire LCCC in order to be liable under CERCLA. While the LCCC can be a facility under CERCLA, groundwater monitor *wells* can also be CERCLA facilities. *See id.* G&M's attempt to limit this definition of facility is directly contrary to the language and policy of CERCLA. Contractors can be liable under CERCLA as arrangers or transporters. *See Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988); *see also Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9th Cir. 1992) (holding that a contractor excavator could be liable as a CERCLA "operator").

G&M also attempts to fuse its narrow interpretation of facility into the Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). *See* Writ Petition, p. 21-22. *Bestfoods* did not limit the application of a CERCLA facility or its meaning in connection with operator liability. Thus, incorporating CERCLA's broad definition of facility into the application of CERCLA's operator liability scheme as examined under *Bestfoods* shows that the Fifth Circuit applied the correct legal standard to the facts at hand. *Bestfoods* states that "an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." *See* Writ Petition, p. 21, citing *Bestfoods*, 524 U.S. at 66. It is certainly possible for G&M to be found at trial to have "operated" the defective wells that qualify as CERCLA "facilities." The Fifth Circuit applied the correct standard.

Finally, there is no conflict between the Fifth Circuit's decision in this case and *Blasland, Bouck & Lee, Inc. v. City of*

North Miami, 96 F. Supp.2d 1375 (S.D. Fla. 2000). First, the environmental contractor in *Blasland* was specifically found to be a "response action contractor" as defined under 42 U.S.C. § 9619. *Id.* at 1378. Second, and more importantly, there was no evidence that the environmental contractor in *Blasland* had conducted any affirmative action causing the spread of contamination to uncontaminated areas. *Id.* at 1380. Implicit in the *Blasland* decision is that had the contractor exacerbated the contamination, it could have been liable under CERCLA. G&M is not a "response action contractor." Further, whether G&M's activities caused the exacerbation of contamination at the LCCC is a central issue in dispute in this case. Thus, *Blasland* is distinguishable and fails to support G&M's propositions regarding CERCLA's operator liability.

G&M's argument that environmental contractor liability undermines CERCLA's policies is also erroneous. First, Congress has spoken — there is an exclusion only for those who fit the definition of "response action contractor" — so CERCLA's policy is irrelevant on this point. Second, the case law rejects any such argument. *See Tanglewood,* 849 F.2d at 1573; *Kaiser,* 976 F.2d at 1341-42. Finally, a central CERCLA policy is to make the polluter pay, and if G&M caused the contamination and meets CERCLA's definition of "operator" (or "arranger"), G&M should pay.

Given the status of CERCLA operator liability, the Fifth Circuit correctly applied the law to G&M and left for the trier of fact the ultimate decision of whether G&M controlled the relevant facility.

III. The Fifth Circuit Followed the "Totality of the Circumstances" Test for "Arranger" Liability, Which Includes Intent as a Factor.

The Fifth Circuit reversed the district court, holding that the "totality of the circumstances" must be taken into account in determining whether a sufficient nexus is present to label a party as a CERCLA "arranger." Pet.'s App., 22a. In its totality of the circumstances test, the Fifth Circuit pointed to two possible factors for review: (1) if and how a "disposal" has taken place and (2) the degree of control over the disposal in question by the party. *Id.* at 21a-22a. In doing so, the Fifth Circuit did not ignore the "intent" issue as suggested by G&M, but effectively made intent one of the factors for review by the district court to determine whether a party is an arranger under CERCLA. This instruction by the Fifth Circuit provides the district courts with more than sufficient instruction regarding arranger liability.

The "totality of the circumstances" test is also not wholly inconsistent with those cases requiring some form of intent to label a party as an arranger. If intent is present, it is strong factor in finding liability as an arranger. However, even when the specific intent to dispose may not be present, other factors outweighing such an intent often support imposition of CERCLA liability. Using G&M's example of an "accidental" spill (see Writ Petition, p. 26), the supplier may have had special knowledge regarding the proper transport and delivery of a particular chemical, the supplier may have controlled the unloading procedure used that resulted in the spill, and the supplier may have negligently provided improper unloading procedures that impacted the spill. Under these circumstances, CERCLA's policy to hold the party responsible for a release liable for the resulting clean-up costs would call for the imposition of arranger liability. Given the facts in this case, the Fifth Circuit properly reversed and remanded to the district court for a review of the "totality of the

circumstances" regarding G&M's activity at the LCCC as an arranger under CERCLA.

CONCLUSION

For these reasons, G&M's Petition for Writ of Certiorari should be denied.

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